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Supreme Court, U.S.  
FILED

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JOSEPH F. SPANIOLO, JR.  
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No.

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1989

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MICHAEL VON RUECKER,  
*Petitioner,*

vs.

HOLIDAY INNS, INC., RICHARD L. FOWLER,  
TOWERS HOTEL CORPORATION, and MADESCO  
MANAGEMENT CORPORATION,  
*Respondents.*

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**PETITION FOR WRIT OF CERTIORARI  
TO THE MISSOURI COURT OF APPEALS  
EASTERN DISTRICT**

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## **QUESTIONS PRESENTED**

Section 537.053 RSMo. requires that in order for a civil action for damages to be brought by an injured minor against a liquor licensee for selling intoxicating liquor to the minor, the liquor licensee must have been convicted or received a suspended imposition of sentence as a result of selling the intoxicating liquor to the minor. In this case the prosecuting attorney, acting with the police, required the injured minor to give a statement and confession to the police before charges against the liquor licensee would be considered.

The question presented is whether Section 537.053 RSMo. unconstitutionally violates such an injured minor's right against self-incrimination and right to due process of the law guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution.

**LIST OF PARTIES**

The parties to this proceeding are Petitioner, Michael Von Ruecker, and Respondents Holiday Inns, Inc., Richard L. Fowler, Towers Hotel Corporation and Madesco Management Corporation.

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**PETITION FOR WRIT OF CERTIORARI  
TO THE MISSOURI COURT OF APPEALS  
EASTERN DISTRICT**

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The Petitioner, Michael Von Ruecker, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Missouri Court of Appeals, Eastern District, entered in the above-captioned case on June 27, 1989.

**OPINIONS BELOW**

The opinion of the Missouri Court of Appeals, Eastern District, is reported as *Von Ruecker v. Holiday Inns, Inc.*, 775 S.W.2d 295 (Mo.App.1989), and is reprinted in the Appendix hereto.

There was no opinion issued by the St. Louis City Circuit Court, only an order sustaining Respondents' Motions to

Dismiss Petitioner's Petition for Damages and dismissing Petitioner's Petition for Damages. Said order is reprinted in the Appendix.

### **JURISDICTION**

The procedural history is as follows. On December 16, 1987, Petitioner filed his Petition for Damages. On July 29, 1988, the St. Louis City Circuit Court entered an order sustaining Respondents' Motions to Dismiss Petitioner's Petition for Damages and dismissing Petitioner's Petition for Damages. On August 5, 1988, Petitioner timely filed his Notice of Appeal to the Missouri Court of Appeals, Eastern District. On June 27, 1989, the Missouri Court of Appeals, Eastern District, filed an opinion and order affirming the judgment of the St. Louis City Circuit Court. On August 1, 1989, the Missouri Court of Appeals, Eastern District, denied Petitioner's timely Motion for Rehearing and/or Transfer to the Missouri Supreme Court. On September 12, 1989, the Missouri Supreme Court denied Petitioner's timely Application for Transfer to the Missouri Supreme Court.

In the St. Louis City Circuit Court, Missouri Court of Appeals, Eastern District, and Missouri Supreme Court, Petitioner raised the question of whether Section 537.053 RSMo. is repugnant to the Fifth and Fourteenth Amendments to the United States Constitution. The St. Louis City Circuit Court and the Missouri Court of Appeals, Eastern District, ruled that Section 537.053 RSMo. is not repugnant to the United States Constitution.

The Missouri Supreme Court, the highest Court of the State of Missouri, declined to hear the case. Accordingly, the Missouri Court of Appeals, Eastern District, was the highest Court of the State of Missouri in which a decision could be had.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1257(a).

## STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

### STATUTES

Section 537.053 states as follows:

1. Since the repeal of the Missouri Dram Shop Act in 1934 (Laws of 1933-34, extra session, Page 77), it has been and continues to be the policy of this state to follow the common law of England, as declared in Section 1.010, RSMo., to prohibit dram shop liability and to follow the common law rule that furnishing alcoholic beverages is not the proximate cause of injuries inflicted by intoxicated persons.
2. The legislature hereby declares that this section shall be interpreted so that the holdings in such cases as *Carver v. Schafer*, 647 S.W.2d 570 (Mo. App. 1983); *Sampson v. W.F. Enterprises, Inc.*, 611 S.W.2d 333 (Mo. App. 1980); and *Nesbitt v. Westport Square, Ltd.*, 624 S.W.2d 519 (Mo. App. 1981) be abrogated in favor of prior judicial interpretation finding the consumption of alcoholic beverages, rather than the furnishing of alcoholic beverages, to be the proximate cause of injuries inflicted upon another by an intoxicated person.
3. Notwithstanding subsections 1 and 2 of this section, a cause of action may be brought by or on behalf of any person who has suffered personal injury or death against any person licensed to sell intoxicating liquor by the drink for consumption on the premises who, pursuant to Section 311.310, RSMo., has been convicted, or has received a suspended imposition of sentence arising from the conviction, of the sale of intoxicating liquor to a person under the age of twenty one (21) years or an obviously intoxicated person if the sale of such intoxicating liquor is the proximate cause of the personal injury or death sustained by such person.

Section 311.310 RSMo. states as follows:

Any licensee under this Chapter, or his employee, who shall sell, vend, give away or otherwise supply any intoxicating liquor in any quantity whatsoever to any person under the age of twenty one (21) years, or to any person intoxicated or appearing to be in a state of intoxication, or to a habitual drunkard, and any person whomsoever except his or her parent or guardian who shall procure for, sell, give away or otherwise supply intoxicating liquor to any person under the age of twenty one (21) years, or to any intoxicated person or any person appearing to be in a state of intoxication, or to a habitual drunkard, shall be deemed guilty of a misdemeanor; provided, however, that this section shall not apply to the supplying of intoxicating liquor to a person under the age of twenty one (21) years for medical purposes only, or the administering of said intoxicating liquor to any person by a duly licensed physician.

Section 311.325 RSMo. states as follows:

Any person under the age of twenty-one (21) years who purchases or attempts to purchase, or has in his possession, any intoxicating liquor as defined in Section 311.320 is guilty of a misdemeanor.

## **CONSTITUTIONAL PROVISIONS**

The Fifth Amendment to the United States Constitution states, in pertinent part, as follows:

No person ..... shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law.....

The Fourteenth Amendment to the United States Constitution states, in pertinent part, as follows:

Section 1. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the

United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

### **STATEMENT OF THE CASE**

Petitioner filed a Petition for Damages against Respondents in St. Louis City Circuit Court for negligence, intentional tort, products liability and breach of contract after suffering injuries in an alcohol-related automobile accident on December 18, 1986.

In his Petition for Damages, Petitioner alleged that Respondents served him intoxicating liquor when he was under the age of twenty-one (21) years and obviously intoxicated.

Respondents each filed a Motion to Dismiss the Petition for Damages, alleging that Petitioner failed to state a cause of action or claim upon which relief could be granted because Petitioner failed to allege that Respondents, pursuant to Section 311.310 RSMo., had been convicted or had received a suspended imposition of sentence for the sale of intoxicating liquor to a person under the age of twenty-one (21) years or to an obviously intoxicated person as required under Section 537.053 RSMo.

Petitioner filed Suggestions in Opposition to Respondents' Motions to Dismiss, arguing that Section 537.053 RSMo. is unconstitutional because it violates Petitioner's right against self-incrimination and right to due process of the law guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution. In support of his argument Petitioner referred to certain documents filed with his Suggestions in Opposition to Respondents' Motions to Dismiss which contain the following facts.

Petitioner and two (2) minor friends went to Respondents' tavern where they were served approximately five (5) or six (6)

pitchers of beer and a glass or more of whiskey over a period of approximately two and one-half hours. Petitioner, who had just turned nineteen (19) the month before, was served well past the point of intoxication to the extent that his blood alcohol content was .187 by weight several hours after consuming the intoxicating liquors. The bar was not crowded; only a few other customers were present, yet the bartender continued to serve Petitioner and made no effort to check Petitioner's identification.

After leaving Respondents' tavern, Petitioner lost control of his automobile and overturned it in a single car accident. As a result, Petitioner is and will remain a quadriplegic.

The liquor law violations committed by Respondents were reported by Petitioner's counsel to the St. Louis Circuit Attorney's office (the state's prosecuting attorney's office for St. Louis) within five (5) days of the violations. Petitioner's counsel was told that Petitioner and the two (2) minors he was with would have to appear at the St. Louis Metropolitan Police Station and give statements and confessions before the matter would be investigated further, and that the three (3) would be subject to arrest and prosecution for illegal possession of intoxicating liquor if they confessed to the offense, which they later did only so criminal charges against Respondents could be pursued.

George Peach, who has been the Circuit Attorney for St. Louis since 1977, testified in his deposition that he refused to prosecute Respondents, but if he would have, Petitioner would have had to testify. This is a normal requirement in a criminal prosecution of this nature because, according to Mr. Peach, an independent witness is usually not available.

In this case, no witnesses other than Petitioner and his two (2) minor friends were available to testify on the sale of intoxicating liquor to Petitioner and Petitioner's age.

Petitioner's constitutional argument was rejected by the St. Louis City Circuit Court as it sustained Respondents' Motions to Dismiss Petitioner's Petition for Damages and dismissed Petitioner's Petition for Damages on July 29, 1988. Petitioner's argument was raised again in his Brief and Reply Brief filed in the Missouri Court of Appeals, Eastern District, which also rejected the argument.

## REASONS FOR GRANTING THE WRIT

This Court should grant the writ of certiorari because the decision of the Missouri Court of appeals decided a federal question involving the Fifth and Fourteenth Amendments to the United States Constitution in a way which conflicts with numerous applicable decisions of this Court as discussed herein.

Section 537.053 RSMo. clearly violates the Self-Incrimination Clause of the Fifth Amendment applicable to the State of Missouri by reason of the Fourteenth Amendment in that the effect of Section 537.053 RSMo. is to give an injured minor such as Petitioner the choice of either confessing to the misdemeanor offense of unlawful purchase or possession of intoxicating liquor in violation of Section 311.325 RSMo., or being barred from filing a civil action against the tavern to recover for his injuries. *Malloy v. Hogan*, 378 U.S.1 (1964).

While Section 537.053 RSMo. does not expressly require this choice, this is its effect, and in determining the constitutionality of a statute this Court concerns itself with its practical operation and potential impact in ascertaining whether constitutional rights have been denied. *Reitman v. Mulkey*, 387 U.S. 369, 380 (1967); *American Oil Company v. Neill*, 380 U.S. 451, 455 (1965); *Oyama v. State of California*, 332 U.S. 633, 636 (1948).

The Missouri Court of Appeals held that Petitioner's waiver of his right against self-incrimination under these circumstances was voluntary as it was in furtherance of his efforts to secure convictions of Respondents. This holding conflicts with *Lefkowitz v. Turley*, 414 U.S. 70 (1973), where this Court held that a "waiver secured under the threat of substantial economic sanction cannot be termed voluntary." *Id.*, at 83-84.

The threatened loss of the opportunity to recover from Respondents was inherently coercive. *Lefkowitz v. Cunningham*, 431 U.S. 801, 807 (1977). Such potential economic benefits must be taken into account as this Court said in *Cunningham*:

“Prudent persons weigh heavily such legally unenforceable prospects in making decisions; to that extent, removal of those prospects constitutes economic coercion.” *Ibid.*; see *Garrity v. New Jersey*, 385 U.S. 493, 498 (1967) (Where the choice is “between the rock and the whirlpool,” duress is inherent in deciding to “waive” one or the other.).

The Fourteenth Amendment secures against State invasion Petitioner’s right to remain silent “unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty ..... for such silence.” *Malloy v. Hogan*, 378 U.S.1, 8 (1964). Here, any refusal by an injured minor such as Petitioner to waive his right against self-incrimination leads automatically and without more to imposition of sanctions in violation of the Fourteenth Amendment. *Lefkowitz v. Cunningham*, 431 U.S. 801, 805, 808 (Fn5) (1977). Petitioner was not offered immunity and none was available under Missouri law.

Section 537.053 RSMo., in effect, requires an injured minor such as Petitioner to go to law enforcement officials, confess to a violation of the law and provide the evidence to convict himself and the tavern, or have no possibility of recovering for his injuries. This in direct conflict with the American system of criminal justice which constitutionally compels governments, state and federal, to establish guilt by evidence independently and freely secured. *Malloy v. Hogan*, 378 U.S.1, 7-8 (1964).

The silent approach of Section 537.053 RSMo. is just as unconstitutional as any other. *Spevack v. Klein*, 385 U.S. 511, 515 (1967). To allow the State of Missouri to benefit from this approach would encourage governmental circumvention of our adversary system and erode the Fifth Amendment, the “essential mainstay” of our system of criminal justice. *Malloy v. Hogan*, 378 U.S.1, 7 (1964); see *The Conjurer’s Circle - The Fifth Amendment Privilege in Civil Cases*, 91 Yale L.J. 1062, 1110 (Fn186)-1111 (1982).

**CONCLUSION**

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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Counsel for Petitioner

**CERTIFICATE OF SERVICE ON THE ATTORNEY  
GENERAL FOR THE STATE OF MISSOURI**

I hereby certify that a copy of Petitioner's Petition for Writ of Certiorari was deposited in a United States mailbox, with first-class postage prepaid, and properly addressed to Attorney General William L. Webster, Attorney General for the State of Missouri, P.O. Box 899, Jefferson City, MO 65102, this 11th day of December, 1989, for the reason that 28 U.S.C. Section 2403 (b) may be applicable.

/s/ John F. Mulligan, Jr.  
Counsel for Petitioner

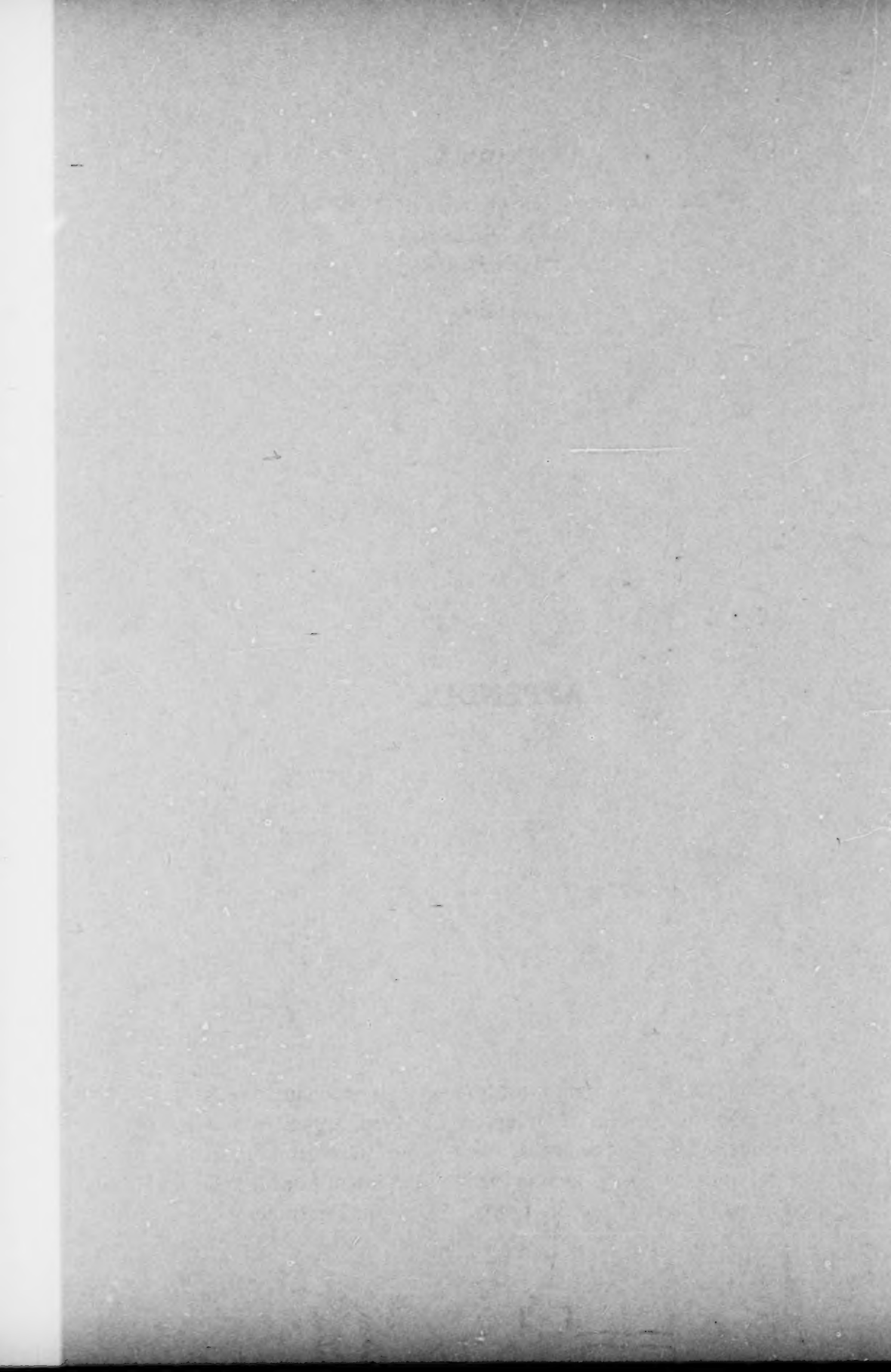
Subscribed and sworn to before me this 11th day of December, 1989.

/s/ George F. Lestina  
Notary Public

My Commission Expires:  
January 10, 1992



## **APPENDIX**



**APPENDIX A**

**IN THE MISSOURI COURT OF APPEALS  
EASTERN DISTRICT  
DIVISION FOUR**

**No. 55288**

**MICHAEL VON RUECKER,  
Plaintiff-Appellant,**

**vs.**

**HOLIDAY INNS, INC., RICHARD L. FOWLER,  
TOWERS HOTEL CORPORATION and  
MADESCO MANAGEMENT,  
Defendants-Respondents.**

**Appeal from the Circuit Court  
of the City of St. Louis**

**Hon. Brendan Ryan, Judge**

**OPINION FILED: June 27, 1989**

Appellant brought an action against respondents for negligence, intentional tort, products liability and breach of contract after suffering injuries in an alcohol related automobile accident on December 18, 1986. Appellant alleged that he was served intoxicating liquor by respondents when he was under the age of twenty-one and obviously intoxicated. Each respondent moved to dismiss for failure to state a claim upon which relief could be granted. The trial court sustained respondents' motions on July 29, 1988. Appellant filed a timely appeal from this dismissal. We affirm.

The facts, viewed in a light most favorable to appellant, are as follows: On the evening of December 17, 1986, appellant and two friends, all under the age of twenty-one, were drinking in Jimbo's Lounge, a bar located in the Holiday Inn at Fourth and Pine Streets in the City of St. Louis. Later, on December 18,

1986, at approximately 2:30 a.m., appellant overturned his car in a single car accident. As a result, appellant is and will remain a quadriplegic.

On December 16, 1987, appellant filed a three count petition for damages against respondents Holidays Inns, Inc. and its employee Richard Fowler. The respondents filed separate motions to dismiss on the ground that appellant failed to state a cause of action because he failed to satisfy the conviction requirement of §537.053.3, RSMo. 1986. On March 3, 1988, the trial court heard and denied the motions, without prejudice so that appellant could make a record regarding the constitutionality of the statute. The trial court indicated in its order that respondents could renew their motions in sixty days.

Appellant deposed Circuit Attorney George Peach, Sgt. Roger Kohler, Officer Fred Hussman, Ms. Shirley McEwan (Custodian of Records for the St. Louis City Police Department) and William Torno (St. Louis District Supervisor, Division of Liquor Control). Appellant also submitted interrogatories and a request for production of documents to respondents. Answers and objections to appellant's discovery requests were filed on April 6, 1988. Respondents' objections were sustained by the trial court on April 21, 1988.

On April 19, 1988, the Supreme Court of Missouri handed down its opinion in the case of *Simpson v. Kilcher*, 749 S.W.2d 386. *Simpson* upheld the validity of §537.053 and rejected constitutional attacks premised on violations of the open courts doctrine, separation of powers, due process and equal protection, stating that, "where the plaintiff is a victim of drunk driving, the conviction of the liquor licensee is an element of plaintiff's right to sue, not an obstruction or bar to his right to sue." *Id.* at 389.

Appellant filed his First Amended Petition on June 15, 1988, in which he joined Towers Hotel Corporation and Madesco Management as additional defendants. He added a breach of

contract cause of action to his previous negligence, products liability and intentional tort actions on the theory that he was a third party beneficiary of Madesco's and Towers' contractual obligations to operate Jimbo's Lounge in an orderly and law abiding manner.

On July 13, 1988, separate motions to dismiss were filed on behalf of each respondent. The trial court heard and sustained these motions on July 29, 1988. This appeal followed.

In reviewing the trial court's dismissal of an action, we must determine if the facts pleaded and the inferences reasonably drawn therefrom demonstrate any ground for relief. We treat the facts averred as true, construe all averments liberally and favorably to appellant and determine whether the pleadings invoke principles of substantive law upon which relief may be granted. *Detling v. Edelbrock*, 671 S.W.2d 265, 267 (Mo. banc 1984).

In his first point, appellant asserts that the trial court erred in dismissing his petition because §537.053, RSMo 1986, is inapplicable to licensees who serve intoxicating liquor to obviously intoxicated minors. We first look to the statute in question.

1. Since the repeal of the Missouri Dram Shop Act in 1934 (Laws of 1933-34, extra session, page 77), it has been and continues to be the policy of this state to follow the common law of England, as declared in section 1.010, RSMo, to prohibit dram shop liability and to follow the common law rule that furnishing alcoholic beverages is not the proximate cause of injuries inflicted by intoxicated persons.

2. The legislature hereby declares that this section shall be interpreted so that the holdings in cases such as *Carver v. Schafer*, 647 S.W.2d 570 (Mo. App. 1983); *Sampson v. W.F. Enterprises, Inc.*, 611 S.W.2d 333 (Mo. App. 1980); and *Nesbitt v. Westport Square, Ltd.*, 624 S.W.2d 519

(Mo. App. 1981) be abrogated in favor of prior judicial interpretation finding the consumption of alcoholic beverages, rather than the furnishing of alcoholic beverages, to be the proximate cause of injuries inflicted upon another by an intoxicated person.

3. Notwithstanding subsections 1 and 2 of this section, a cause of action may be brought by or on behalf of any person who has suffered personal injury or death against any person licensed to sell intoxicating liquor by the drink for consumption on the premises who, pursuant to section 311.310, RSMo, has been convicted or has received a suspended imposition of the sentence arising from the conviction, of the sale of intoxicating liquor to a person under the age of twenty-one years or an obviously intoxicated person if the sale of such intoxicating liquor is the proximate cause of the personal injury or death sustained by such person.

Missouri's former dram shop act, Section 4487, RSMo 1929, was repealed by the General Assembly in 1934. Questions concerning dram shop liability were then placed with the courts. There was no dram shop liability in Missouri after 1934 until the judiciary began chipping away at the concept in *Sampson v. W.F. Enterprises, Inc.*, 611 S.W.2d 333 (Mo. App. 1980), and *Nesbitt v. Westport Square, Ltd.*, 624 S.W.2d 519 (Mo. App. 1981). These cases found that a violation of §311.310, RSMo, gave rise to a cause of action against tavern owners. Later, in *Carver v. Schafer*, 647 S.W.2d 570 (Mo. App. 1983), this court extended liability on purely common law concepts. *Carver* held that §311.310 is indicative of a public policy that everyone is required to take ordinary care against reasonably anticipated injuries. *Id.* at 575. The tavern owner has the same duty of care and, therefore, should have avoided supplying the patron with more intoxicating liquor once it was apparent that the patron was already intoxicated. *Id.*

All three cases were, however, abrogated by §537.053 which became effective on September 28, 1985. This statute is “a legislative prohibition of dram shop liability coupled with the creation of a new, limited cause of action. . . .” *Simpson v. Kilcher*, 749 S.W.2d 386, 390 (Mo. banc 1988). The statute is rationally justified in that the legislature made a policy decision to place responsibility on the drunk driver. *Id.* at 392. The former common law rule against dram shop liability has, therefore, been effectively reinstated except where there has been a conviction or suspended imposition of sentence.

Appellant’s first argument under this point is that §537.053 only applies to a cause of action brought by a third party. Section 537.053.2 specifically abrogates *Sampson v. W.F. Enterprises, Inc.*, *supra*, in which the Western District determined that the parents of a deceased minor, who had been served alcoholic beverages by two different tavern owners, stated a cause of action against the tavern owners when their son overturned his truck and was killed. The purpose of abrogating *Sampson*, *Carver* and *Nesbitt* in the statute was to “promote judicial efficiency . . . by preventing lawsuits against tavern owners every time a patron injures *himself, or another.*” *Simpson*, 749 S.W.2d at 392. (emphasis added) Since the facts in *Sampson* are very similar to the facts herein, and *Sampson* was abrogated, we find that §537.053 applies to first party as well as third party actions.

Appellant next argues that the legislature did not intend to prohibit intoxicated persons from recovering for their own injuries.<sup>1</sup> According to the plain language of subsections 1 and 2

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<sup>1</sup> In support of this argument appellant cites the affidavit of his attorney which recounts a telephone conversation with a member of the Missouri State Senate who participated in the debates and lawmaking processes which resulted in the enactment of what is now §537.053. Whatever the recollection of the distinguished senator may be as to the legislative intent behind the statute, we disregard the affidavit as hearsay while noting, *infra*, that we are bound by what the statute says, not by what one legislator meant for it to say.

of §537.053, there is no dram shop liability. Subsection 3 creates a limited exception in favor of liability. *Andres v. Alpha Kappa Lambda Fraternity*, 730 S.W.2d 547 (Mo. banc 1987). Under this exception, liability exists only when the tavern owner has been convicted or received a suspended imposition of sentence pursuant to §311.310, RSMo, for the sale of intoxicating beverages to a person under the age of twenty-one or to an obviously intoxicated person, and then only if the sale of the intoxicating liquor is the proximate cause of the personal injury or death sustained by such person. §573.053.3, RSMo 1986. Absent such allegation, no cause of action is stated. *Simpson*, 749 S.W.2d at 389.

We are bound by express written law and not by what may or may not have been intended. *Pipe Fabricators, Inc. v. Director of Revenue*, 654 S.W.2d 74, 76 (Mo. banc 1983). We, therefore, find that the statute applies equally to intoxicated persons attempting to recover for their own injuries.

In his final argument under Point I appellant asserts that the conviction requirement in §573.053.3 violates his right against self-incrimination because it is necessary to expose himself to arrest and criminal prosecution by confessing to the offense of unlawful purchase or possession of intoxicating liquor in order to subject respondents to possible conviction.<sup>2</sup> A person can waive his right against self-incrimination as long as the waiver is voluntary, knowing and intelligent. *State v. Curry*, 714 S.W.2d 798, 800 (Mo. App. 1986).

As discussed above, conviction or suspended imposition of sentence of one who sells intoxicating liquor to a minor is a necessary element of the cause of action constructed by

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<sup>2</sup> Section 311.325, RSMo 1986, provides: "Any person under the age of twenty-one years, who purchases or attempts to purchase, or has in his possession, any intoxicating liquor as defined in section 311.020 is guilty of a misdemeanor."

§537.053, but it does not follow that the testimony of the vendee is a prerequisite of the conviction. Clearly, others could testify to the fact of the sale and to the purchaser's age; and, therefore, the necessity of a conviction as an element of a cause of action allowed by §537.053 cannot be argued to invalidate the statute. The statements given by appellant to law enforcement authorities were in furtherance of his effort to secure convictions of the respondents and were unquestionably voluntary.

Point I is denied in its entirety.

In his second, third, fourth, fifth and sixth points, appellant argues that the trial court erred in dismissing his petition because he stated claims based on negligence, intentional tort, strict products liability, negligent products liability and breach of contract. We find that the statutory remedy is exclusive and since appellant was unable to state a cause of action under the statute his action is precluded.

It is a well established principle that when a statute creates a new right or liability that did not exist at common law or under prior statutes, and also provides a specific remedy for the enforcement thereof, that statutory remedy is exclusive. *Gales v. Weldon*, 282 S.W.2d 522, 529 (Mo. 1955). See also, *Schiles v. Gaertner*, 659 S.W.2d 791, 793 (Mo. App. 1983); *State ex rel. Slibowski v. Kimberlin*, 504 S.W.2d 237, 240 (Mo. App. 1973).

Section 537.053.3 created a limited cause of action where none previously existed. The statute expresses a legislative intent to shield tavern keepers from liability for the injuries caused by their drunken patrons unless the tavern keeper "pursuant to section 311.310, RSMo, has been convicted or has received a suspended imposition of the sentence arising from the conviction, of the sale of intoxicating liquor to a person under the age of twenty-one years or an obviously intoxicated person if the sale of such intoxicating liquor is the proximate cause of the personal injury or death sustained by such person." §537.053.3, RSMo 1986. This is a condition to the existence of a cause of

action. *Simpson*, 749 S.W.2d at 389. The condition is an element of the right, *State ex rel. Jewish Hospital of St. Louis v. Buder*, 540 S.W.2d 100, 104 (Mo. App. 1976), and becomes part of the right itself. *State ex rel. Slibowski*, 504 S.W.2d at 240.

In order to state a cause of action a plaintiff must allege the criminal conviction or suspended imposition of sentence. No such allegation was made here. The trial court was, therefore, correct in dismissing all counts in appellant's petition. Points II through VI are denied.

Appellant's seventh point states that the trial court erred when it dismissed his first amended petition because §537.053 is unconstitutional as applied to appellant. The argument under this point is a half page in length and cites no authority; it merely incorporates by reference a motion that was before the trial court. This is not sufficient. The point is deemed abandoned. *Boswell v. Steel Haulers, Inc.*, 670 S.W.2d 906, 912 (Mo. App. 1984); Rule 84.04(d). Moreover, our Supreme Court has already laid to rest appellant's constitutional challenges in *Simpson v. Kilcher*, *supra*. The point is denied.

Finally, appellant asserts the trial court erred when it sustained respondents' objections to appellant's interrogatories and requests for production of documents. Appellant's discovery was for the purpose of determining if respondents had *at any time* been convicted or received a suspended imposition of sentence for violating §310.311. Appellant filed and served interrogatories on respondents Holiday Inns and Richard Fowler on March 17, 1988. Respondents filed their objections on April 6, 1988, arguing that the information requested exceeded the scope of discovery. The trial court sustained these objections, and appellant claims that such ruling prevented him from stating a claim upon which relief could be granted in this case.

We find no error. It is clear there were no convictions, or for that matter charges, arising out of the present case. Other con-

victions or suspended impositions of sentence are of no consequence to the issue of whether a cause of action was stated in this case. To state a cause of action under §537.053.3 the conviction or suspended imposition of sentence must arise from “the sale of intoxicating liquor to a person under the age of twenty-one years or an obviously intoxicated person *if the sale of such intoxicating liquor is the proximate cause of the personal injury or death sustained by such person.*” (Emphasis added) Consequently, the point is denied.

The judgment of the trial court is affirmed.

/s/ Albert J. Stephan, Jr., Judge

Smith, P.J., Satz, J., concur

**APPENDIX B**

**IN THE MISSOURI COURT OF APPEALS  
EASTERN DISTRICT**

**TO: Attorney of Record**

**Page 2 of 3**

**FROM: Deirdre O. Ahr, Clerk**

**DATE August 1, 1989**

**RE: MOTIONS FOR REHEARING AND/OR TRANSFER  
TO SUPREME COURT DENIED**

- 13    55288    RUECKER, MICHAEL VON, APP.  
         VS.        HOLIDAY INNS, INC., ET AL., RESP.
- 14    55334    BALL, JOHN EDWARD, APP.  
         VS.        STATE OF MISSOURI, RESP.
- 15    55389    HARRELL, ALVIN REY, APP.  
         VS.        STATE OF MISSOURI, RESP.
- 16    55391    VOLLMER, BRADLEY, APP.  
         VS.        STATE OF MISSOURI, RESP.
- 17    55404    P, R. L IN THE INTEREST OF P, C, RESP.
- 18    55503    GOFORTH, JAMES A., APP.  
         VS.        STATE OF MISSOURI, RESP.
- 19    55534    COOPER, EUGENE L., APP.  
         VS.        STATE BOARD OF PHARMACY, RESP.
- 20    55574    JACKSON, JAMES ALLEN, APP.  
         VS.        STATE OF MISSOURI, RESP.
- 21    55575    HILL, EUGENE A., APP.  
         VS.        STATE OF MISSOURI, RESP.
- 22    55588    STOCKSTROM, CHARLES, T., RESP.  
         VS.        JOCOBY, RICHARD, ET AL., APP.
- 23    55613    HERRELL, ALVIN REY, APP.  
         VS.        STATE OF MISSOURI, RESP.

24 55679 BENNETT, WILLIAM R. APP.  
VS. STATE OF MISSOURI, RESP.

**APPENDIX C**

**IN THE SUPREME COURT OF MISSOURI**

September Session, 1989

No. 71966

E.D. No. 55288

Michael Von Ruecker,

Plaintiff-Appellant,

vs. (TRANSFER)

Holiday Inns, Inc., et al.,

Defendants-Respondents.

Now at this day on consideration of Plaintiff-Appellant's Application to transfer the above entitled cause from the Eastern District Court of Appeals, it is ordered that said application be and the same is hereby denied.

STATE OF MISSOURI-Sct.

I, THOMAS F. SIMON, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and complete transcript of the judgment of said Supreme Court, entered of record at the September Session thereof, 1989, and on the 12th day of September, 1989, in the above entitled cause.

Given under my hand and seal of said Court, at the City of Jefferson, this 12th day of September, 1989.

/s/ Thomas F. Simon  
Clerk

/s/ Kathleen Blanton  
D.C.

**APPENDIX D**

**MISSOURI CIRCUIT COURT  
TWENTY-SECOND JUDICIAL CIRCUIT  
(St. Louis City)**

Division 1

No. 872-07176

Michael Von Ruecker

vs.

Holiday Inns, Inc.

**MEMORANDUM FOR CLERK**

(7/29/88)

Separate Motions to Dismiss of Defendants Holiday, Inns, Inc., Richard L. Fowler, Towers Hotel Corporation and Madesco Management Corporation called, heard and sustained. Plaintiff's Motion for a Protective Order is sustained as follows: Plaintiff's Deposition Exhibits E, G, H and L are ordered sealed for good cause shown. Plaintiff's First Amended Petition is hereby dismissed.

/s/ James E. Whaley

Atty for Defendants

**GREIDER & MULLIGAN**

By:/s/ John F. Mulligan, Jr.

225 S. Meramec, Suite 525T

Clayton, MO 63105

Attorneys for Plaintiff

**SO ORDERED**

/s/ Brendan Ryan

Judge

**APPENDIX E**

**IN THE MISSOURI COURT OF APPEALS  
EASTERN DISTRICT**

No. 55288

**MICHAEL VON RUECKER,**  
Plaintiff-Appellant,

vs.

**HOLIDAY INNS, INC., RICHARD L. FOWLER,  
TOWERS HOTEL CORPORATION and  
MADESCO MANAGEMENT CORPORATION,**  
Defendants-Respondents.

Appeal from the Circuit Court  
of the City of St. Louis

Hon. Brendan Ryan, Judge

**NOTICE OF APPELLANT'S FILING OF PETITION FOR  
WRIT OF CERTIORARI IN THE  
UNITED STATES SUPREME COURT**

COMES NOW Appellant by and through his attorneys,  
Greider & Mulligan, and hereby gives notice that on this 11th  
day of December, 1989, he mailed for filing in the United States  
Supreme Court, a Petition for Writ of Certiorari.

**GREIDER & MULLIGAN**

By: \_\_\_\_\_  
John F. Mulligan, Jr. #34431  
Attorneys for Appellant  
225 S. Meramec, Suite 525T  
Clayton, MO 63105  
(314) 727-8910

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing was mailed this 11th day of December, 1989 to Mr. James E. Whaley, Attorney for Respondents, 705 Olive Street, Suite 1100, St. Louis, MO 63101, and the original was filed in the Missouri Court of Appeals, Eastern District, this 11th day of December, 1989.

/s/ John F. Mulligan, Jr.